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Abstract

This article will survey decisions of the Florida Supreme Court during **1985** which dealt with substantive criminal law issues in three important areas: **(1)** criminal offenses, **(2)** lesser included and multiple offenses, and **(3)** defenses to crimes.

KEYWORDS: offenses, crimes, defenses

Substantive Criminal Law*

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This article will survey decisions of the Florida Supreme Court during 1985 which dealt with substantive criminal law issues in three important areas: (1) criminal offenses, (2) lesser included and multiple offenses, and (3) defenses to crimes. Obviously, all cases addressing substantive criminal law issues are not included. Those that are included represent certain important (though sometimes quite narrow) changes in Florida's substantive criminal law, or are representative of the Florida Supreme Court's focus and direction with regard to the issue considered.

I. Criminal Offenses

(1) Escape. In *State v. Ramsey*,¹ the court addressed the issue of whether Florida Statute section 944.40² is violated when an arrested but unhandcuffed suspect escapes a police officer before being placed in the police car. The Fifth District Court of Appeal had reversed Ramsey's conviction,³ concluding that in order to come within the statute the escape must occur while the prisoner is being transported. In quashing the district court of appeal decision, the supreme court ap-

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1. 475 So. 2d 671 (Fla. 1985). *State v. Iaforaro*, 475 So. 2d 209 (Fla. 1985), a case presenting the same issue, was decided by the court about six weeks later, with the same result.

2. FLA. STAT. § 944.40 (1981) provides:

Any prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public roads, or being transported to or from a place of confinement who escapes or attempts to escape from such confinement shall be guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084. The punishment of imprisonment imposed under this section shall run consecutive to any former sentence imposed upon any prisoner.

3. *Ramsey v. State*, 442 So. 2d 303 (Fla. 5th Dist. Ct. App. 1983).

proved the holding of *State v. Akers*,⁴ from the Second District Court of Appeal, which was in conflict. *Akers* held that to come within the escape statute the state need show only (1) the right to legal custody and (2) a conscious and intentional act of the defendant in leaving the established area of such custody.⁵

The court went on to address the meaning of the words "being transported to or from a place of confinement" as found in the statute. In this regard the court noted that one who meets the definition of "prisoner," as found in Florida Statute section 944.02(5),⁶ is at the time he becomes a prisoner "being transported to a place of confinement." As if to underscore the resoluteness of its decision, the court held that even if the words of the statute did not lend themselves to this interpretation, it would reach the same conclusion based on the purpose of the legislature in enacting the law. That intent, according to the court, was "to prevent lawfully arrested prisoners from escaping the custody of the arresting officer."⁷

(2) Attempted Manslaughter. *Tillman v. State*⁸ was an interesting case in which the supreme court ruled that an issue on appeal had not been properly preserved during the trial, but then went ahead and considered it anyway. Tillman was convicted of second degree murder, attempted manslaughter and carrying a concealed firearm. The defense argued against the trial court's entering judgment on the attempted manslaughter conviction, since there was no such offense under Florida law. The judge disagreed and entered judgment on the three verdicts.

On appeal, Tillman raised, among others, the issue of the existence of the crime of attempted manslaughter. The district court of appeal affirmed all three convictions⁹ and certified to the Florida Supreme Court the question of the existence of the crime of attempted man-

4. 367 So. 2d 700 (Fla. 2d Dist. Ct. App. 1979).

5. *Id.* at 702, citing Warford v. State, 353 So. 2d 1263 (Fla. 1st Dist. Ct. App. 1978).

6. "Prisoner" is defined in FLA. STAT. § 944.02(5) (1981) as follows:

"Prisoner" means any person who is under arrest and in the lawful custody of any law enforcement official, or any person convicted and sentenced by any court and committed to any municipal or county jail or state prison, prison farm, or penitentiary, or to the custody of the department, as provided by law.

7. *Ramsey*, 475 So. 2d at 673.

8. 471 So. 2d 32 (Fla. 1985).

9. *Tillman v. State*, 440 So. 2d 666 (Fla. 1st Dist. Ct. App. 1983).

slaughter as being of great public importance.¹⁰

In *Taylor v. State*,¹¹ an opinion written after the district court of appeal affirmed Tillman's conviction, the supreme court stated that there was a crime of attempted manslaughter in Florida, but such a conviction "must be based on proof of an act . . . with the requisite criminal intent and may not be based on mere culpable negligence."¹² In his brief to the supreme court, Tillman recognized that *Taylor* was controlling but argued that he should get a new trial on the attempted manslaughter count because of doubts about the evidence and the jury's interpretation of it in light of the *Taylor* limitations.

Chief Justice Boyd, writing for a unanimous court approving the district court of appeal's decision, stated that since Tillman had raised no objection to the jury instructions which were given by the trial court concerning the offense of attempted manslaughter, the issue was not properly preserved for appeal. Moreover, the court went on to say that after reviewing the record, there was sufficient evidence to support the conclusion that Tillman had acted with the requisite criminal intent and not with mere culpable negligence.¹³

Tillman stands for the proposition that attempted manslaughter is a prosecutable offense in Florida, but conviction must be based on a showing of criminal intent and not mere culpable negligence.

(3) **Drugs and Narcotics.** *Way v. State*¹⁴ concerned the required elements of proof for a proper conviction of trafficking in cocaine under Florida Statute section 893.135(1)(b)(1).¹⁵ During Way's trial, the court instructed the jury that in order to find Way guilty, they must find that the state proved beyond a reasonable doubt that Way knowingly sold, delivered or possessed a certain substance; that he knew the substance was cocaine or a mixture containing cocaine; and that the quantity of the cocaine involved was twenty-eight grams or more. Way requested that the jury be instructed that it could vote for conviction only if the state proved that Way knew that the cocaine he possessed

10. *Id.* "Is there a crime of attempted manslaughter under the statutes of the state of Florida?" *Id.*

11. 444 So. 2d 931 (Fla. 1983).

12. *Id.* at 934.

13. *Tillman*, 471 So. 2d at 35.

14. 475 So. 2d 239 (Fla. 1985).

15. FLA. STAT. § 893.135(1)(b)(1) (1983) provides: "Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine . . . is guilty of a felony of the first degree, which felony shall be known as 'trafficking in cocaine.'"

weighed twenty-eight grams or more; the judge refused the instruction. Way was convicted and sentenced to three years imprisonment.

The district court of appeal affirmed,¹⁶ expressly approving the jury instructions given, and certified to the supreme court the question of the requirement of proof of the defendant's knowledge of the weight of the cocaine.¹⁷

In a unanimous opinion, the supreme court approved the district court of appeal's decision. Justice Overton, writing for the court, stated that the statute requires proof of knowledge of the substance possessed, but not proof of knowledge of its weight. "The word 'knowingly' as used in the statute," the court stated, "modifies only the possession element of the offense and not the quantity."¹⁸

(4) Grand Theft (of a motor vehicle). The facts in *Davis v. State*¹⁹ can be briefly stated. Davis attempted to purchase a \$23,000 Mercedes-Benz automobile by means of a worthless check, and was thereafter charged with first-degree grand theft under Florida Statute section 812.014(2)(a) (theft of property with a value of \$20,000 or more). Davis moved to dismiss the information, arguing that he could only be charged with second degree theft under Florida Statute section 812.014(2)(b) (theft of a motor vehicle). His argument was based on *State v. Getz*,²⁰ in which a conviction for grand theft of the second degree by stealing a firearm was upheld notwithstanding the defendant's contention that a firearm of a value less than \$100 must be prosecuted under the petit theft statute. According to Davis, since *Getz* says a firearm is a firearm, regardless of value, then an automobile is an automobile, regardless of value — and theft of an automobile must be charged as theft of "an automobile," and not theft of an item "of a value of \$20,000 or more." A majority of the supreme court found Davis' reliance on *Getz* misplaced. While the legislature chose not to make value an element of proof in certain named thefts (including firearms and motor vehicles), it does not follow that the legislature has not given the state discretion to make proof of value an element in more serious thefts. Thus, the court held that the state could prosecute Davis for

16. *Way v. State*, 458 So. 2d 881 (Fla. 5th Dist. Ct. App. 1984).

17. "It is proof that a defendant knows that the weight of the substance possessed equals 28 grams or more essential in obtaining a conviction under section 893.135(1)(b)?" *Id.* at 882.

18. *Way*, 475 So. 2d at 241.

19. 475 So. 2d 223 (Fla. 1985).

20. 435 So. 2d 789 (Fla. 1983).

grand theft in the first degree and assume the burden of proving that the value of the motor vehicle was \$20,000 or more.²¹ The majority opinion would appear unassailable in logic and reason; yet, interestingly and surprisingly, three justices dissented, supporting Davis' position.²²

(5) Retail Theft. In *Emshwiller v. State*,²³ a case of interest but of narrow scope, the supreme court answered the question of whether or not "retail theft" was a separate crime from other theft. Relying on *Tobe v. State*,²⁴ Emshwiller argued that retail theft of merchandise is a separate crime from other theft and that a conviction under the retail theft statute is necessarily a second-degree misdemeanor. The supreme court disagreed. Retail theft under Florida Statute section 812.015 is a species of the theft defined in section 812.014, not a separate crime for penalty purposes. The court noted that section 812.015 does not contain a penalty provision for first offenses, but merely provides for enhanced penalties for second or subsequent convictions for theft of merchandise or farm produce.²⁵ Language in *Tobe* to the contrary was disapproved.

Another issue addressed by the court in the case involved the determination of value. Emshwiller had requested a jury instruction that "market value" was "what a willing seller is willing to accept and a willing buyer is willing to pay when neither is compelled to sell or buy." Instead, the trial judge instructed that the value was determined by the sale price at the time the merchandise was stolen. The supreme court approved the instruction of the trial judge. According to the court, market value is the same as the retail price where the theft is from a department store and salability at the retail price is established.²⁶

(6) Burglary. The supreme court reviewed three cases in 1985 involving the burglary "presumption of intent" found in Florida Statute section 810.07.²⁷ The resulting opinions clarified the function and use of the statute in burglary prosecutions.

21. *Davis*, 475 So. 2d at 224.

22. *Id.* at 225.

23. 462 So. 2d 457 (Fla. 1985).

24. 435 So. 2d 401 (Fla. 3d Dist. Ct. App. 1983).

25. *Emshwiller*, 462 So. 2d at 458.

26. *Id.*

27. FLA. STAT. § 810.07 (1983) provides: "In a trial on the charge of burglary, proof of the entering of such structure or conveyance of any time stealthily and without consent of the owner or occupant thereof shall be prima facie evidence of entering with intent to commit an offense."

In the first case, *L.S. v. State*,²⁸ the defendant, a juvenile, had been charged with burglary by petition for delinquency. The charging document specified that the defendant "did unlawfully enter or remain in a certain structure . . . with the intent to commit an offense therein, to wit: THEFT in violation of section 810.02, Florida Statutes."²⁹

In obtaining a conviction, the state relied on the presumption of intent statute, which presumes intent to commit a crime upon a showing of stealthy non-consensual entry. The defendant argued that since the state had charged an intention to commit a specific offense, reliance upon the statutory presumption was improper. Rather, the defendant stated, the state must prove intent to commit the offense specified in the charging document without the benefit of section 810.07. The defendant relied on *Bennett v. State*,³⁰ a case from the Second District Court of Appeal.

Justice Adkins, writing for an unanimous court, was not persuaded by the defendant's contentions and approved the Third District Court of Appeal's affirmance of the conviction.³¹ In doing so, the court disapproved *Bennett* and stated that "the exact nature of the offense alleged is . . . surplusage so long as the essential element of intent to commit an offense is alleged."³²

In July, the court decided *Toole v. State*.³³ An unanimous court, again through Justice Adkins, reiterated its decision in *L.S. v. State* and in greater detail discussed the legislative history of section 810.07, the presumption of intent statute. While noting that in a charge of burglary at common law the state had the burden of proving "intent to commit a specified crime to the exclusion of all others,"³⁴ the court stated that such a requirement was no longer valid. In enacting section 810.07, the legislature clearly said that proof of intent to commit *any* offense would suffice.

The court went on to state that the *Bennett* case, relied on by defendants Toole and L.S., was in error in "imposing upon the state the burden of proving a specific intent and additionally disproving all other possible criminal intent."³⁵

28. 464 So. 2d 1195 (Fla. 1985).

29. *Id.* at 1195.

30. *Bennett v. State*, 438 So. 2d 1034 (Fla. 2d Dist. Ct. App. 1983).

31. *L.S. v. State*, 446 So. 2d 1148 (Fla. 3d Dist. Ct. App. 1984).

32. *L.S.*, 464 So. 2d at 1196 (emphasis added).

33. 472 So. 2d 1174 (Fla. 1985).

34. *Id.* at 1176.

35. *Id.*

Graham v. State,³⁶ decided by the court in June, presented a different question regarding section 810.07. Graham was charged with attempted burglary. The state relied on the presumption of intent statute, since there was evidence of unlawful entry. The Fifth District Court of Appeal affirmed,³⁷ and certified to the supreme court the question of whether reliance on section 810.07 in an attempted burglary case was proper.³⁸ The court, again through Justice Adkins and again unanimous, answered the question in the negative, refusing to give the statute effect beyond its clear, unambiguous terms. Since the statute by its express terms pertains only to "a trial on the charge of burglary," it may not be used in a prosecution for attempted burglary, even where there is some evidence of actual illegal entry.

With the presumption of intent statute thus defined and narrowed by these cases, practitioners should be more aware of the limits on the state's reliance on the statutory presumption as well as its clear areas of applicability.

II. Lesser Included and Multiple Offenses

Many of the court's criminal law decisions during 1985 dealt with the issue of lesser included and multiple offenses arising from the same event. As confessed by Justice Shaw in his concurring opinion in *State v. Enmund*,³⁹ the court has had "a long-standing problem with this issue in its various permutations: single transaction rule, double jeopardy, application of the Blockburger rule, lesser included offenses, and generally, legislative intent in adopting section 775.021(4), Florida Statutes (1977)."⁴⁰ The Florida Supreme Court has not struggled with this issue alone. Addressing the double jeopardy aspect of the problem in *Albernaz v. United States*,⁴¹ Justice Rehnquist has called the decisional law in the area "a veritable Sargasso Sea which could not fail to

36. 472 So. 2d 464 (Fla. 1985).

37. *Graham v. State*, 453 So. 2d 528 (Fla. 5th Dist. Ct. App. 1984).

38. *Id.* at 529:

In a criminal case in which a defendant is charged with attempted burglary, and there is proof at trial of defendant's unlawful entry into the structure or residence involved, is it proper for the trial court to rely upon the statutory presumption set forth in section 810.07 in instructing the jury on proof of intent to commit an offense?

39. 476 So. 2d 165 (Fla. 1985).

40. *Id.* at 169.

41. 450 U.S. 333 (1981).

challenge the most intrepid judicial navigator."⁴² Rather than trying to navigate or fully understand the historical permutations of the problem, it is better to examine what the Florida Supreme Court has most recently said on the subject. Below is a brief survey of what appears to be the most important Florida Supreme Court decisions in the area during 1985.⁴³

A. *State v. Watts*.⁴⁴ In *Watts*, the supreme court adopted a statutory language oriented test which makes the legislature's choice of the articles "a" or "any" determinative.

Watts had been adjudicated guilty and sentenced separately on two counts of possession of prison-made knives. The First District Court of Appeal held this to be in error, finding but a single offense for the possession of both knives.⁴⁵ In reaching this conclusion, the court applied the "chronological and special relationships" test previously embraced by the Fifth District Court of Appeal in *Castleberry v. State*.⁴⁶ In so doing, the court recognized, but refused to adopt, the test applied by the Second District Court of Appeal in *State v. Grappin*.⁴⁷ *Grappin* involved prosecution for theft of five firearms under Florida Statute section 812.014(2)(b)(3).⁴⁸ The Second District Court of Appeal held that Grappin could properly be charged with five thefts since the statute proscribed theft of "a" firearm, rather than theft of "any" firearm. The reasoning was that the "a" in reference to "firearm" indicated that the legislature clearly intended to make each firearm separate for prosecution purposes.⁴⁹

Unfortunately, when the First District Court of Appeal had the *Watts* case on appeal, it was not aware that the Florida Supreme Court

42. *Id.* at 343.

43. For the reader who desires a quick review of the Florida decisional law in the area from 1942 through 1983, with some rather accurate predictive conclusions as to the future course of the Florida Supreme Court, see Kaden, *End of the Single Transaction Rule*, FLA. B.J., December, 1983, at 693.

44. 462 So. 2d 813 (Fla. 1985).

45. *Watts v. State*, 440 So. 2d 505 (Fla. 1st Dist. Ct. App. 1983).

46. 427 So. 2d 760 (Fla. 2d Dist. Ct. App. 1983).

47. *Grappin v. State*, 450 So. 2d 480 (Fla. 1984).

48. FLA. STAT. § 812.014(2)(b)(3) (1983) provides: "It is grand theft of the second degree and a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084, if the property stolen is: 3. A firearm."

49. The exact reasoning process for reaching this conclusion was not entirely clear, but apparently there was considerable reliance upon federal cases, cited in *Grappin*, which had reached this conclusion when faced with similar statutory language. *Watts*, 462 So. 2d at 814.

would eventually not only affirm *Grappin*, but also adopt the reasoning of the Second District Court of Appeal in the case.⁵⁰ Consequently, when *Watts* reached the supreme court, the district court of appeal's decision was approved, but not the court's reasoning. Watts had been prosecuted under Florida Statute section 944.47, which essentially prohibited as contraband in a correctional institution "any" firearm or weapon. Looking at the statutory language, as was done in *Grappin*, the court contrasted the article "any" with the article "a" and concluded that the use of "any" by the legislature meant the transaction must be treated as a single offense for prosecution purposes.

B. *Wicker v. State*.⁵¹ In *Wicker*, the supreme court considered whether a defendant could be convicted of both first-degree felony burglary and involuntary sexual battery, which served as the basis for the burglary charge. The district court of appeal set aside the sexual battery conviction, based on its determination that the finding that the defendant committed the assault was indispensable to the conviction of the first-degree burglary.⁵² The supreme court found that the district court of appeal erroneously analyzed the allegations in the charging document to determine whether the convictions could stand, instead of analyzing the offense's statutory elements.⁵³ Relying on its 1984 decisions in *State v. Baker*⁵⁴ and *State v. Gibson*,⁵⁵ the supreme court found that the convictions for both offenses were proper, and quashed the district court of appeal's decision to the contrary.

C. *Green v. State*.⁵⁶ Green was charged with first-degree premeditated murder as a result of a shooting death. At trial, he requested a jury instruction on third-degree murder, asserting that the crime of discharging a weapon into an occupied vehicle was the underlying felony. The trial court refused, finding that third-degree murder is not a lesser included offense of premeditated first-degree murder. On appeal, the district court of appeal affirmed.⁵⁷ Relying on the schedule of lesser included offenses published in the 1981 version of the Florida Standard Jury Instructions in Criminal Cases, the appellate court found that third-degree felony murder is not a lesser included offense of premedi-

50. 450 So. 2d at 480.

51. 462 So. 2d 461 (Fla. 1985).

52. *Wicker v. State*, 445 So. 2d 581 (Fla. 2d Dist. Ct. App. 1984).

53. *Wicker*, 462 So. 2d at 463.

54. 456 So. 2d 419 (Fla. 1984).

55. 452 So. 2d 553 (Fla. 1984).

56. 475 So. 2d 235 (Fla. 1985).

57. *Green v. State*, 453 So. 2d 526 (Fla. 5th Dist. Ct. App. 1984).

tated first-degree murder.

In its decision, the supreme court approved the result of the district court of appeal but not the reasoning. While finding that third-degree felony murder is not a necessarily included offense of first-degree murder, the court stated that it is, under certain circumstances and evidence, a proper, permissive, lesser included offense of first-degree murder, requiring a jury instruction to that effect.

Since the court had repeatedly allowed a felony murder conviction to be sustained under an indictment for first-degree premeditated murder, and since third-degree felony murder was listed in the schedule of lesser included offenses of first-degree felony murder, the court concluded that the district court of appeal erred in its reasoning. However, the district court of appeal was correct in its approval of the trial court's refusal to give the instructions. This result was reached after an analysis of Amended Florida Rule of Criminal Procedure 3.490, which requires the giving of instructions on a lesser included offense only where supported by the evidence. Since the evidence did not support the underlying felony required for third-degree felony murder, the requested instruction on that offense was properly denied.

D. *Garcia v. State*.⁵⁸ In *Garcia*, the Fifth District Court of Appeal certified to the supreme court the following question as being of great public importance: "Whether one can be convicted, although not sentenced, of a lesser included offense after he has been convicted of the greater crime?" This question was framed similarly to the question in *State v. Enmund*,⁵⁹ except "lesser included offense" was used instead of "the underlying felony." This is significant, because as the decision points out, they are not the same. *Garcia* was found guilty of armed robbery⁶⁰ and displaying, using, threatening, or attempting to use a firearm during the commission of a felony.⁶¹ On appeal, the district court of appeal "noted" in its position that the defendant had been convicted of both a greater and a lesser included offense, and thus framed its certified question.⁶²

Referring to its *Enmund* decision, the supreme court wrote that it had already essentially answered the question posed by the lower court.

58. 444 So. 2d 969 (Fla. 5th Dist. Ct. App. 1983), *aff'd*, 476 So. 2d 170 (Fla. 1985).

59. 476 So. 2d 165 (Fla. 1985).

60. In violation of FLA. STAT. § 812.13(2)(a) (1981).

61. In violation of FLA. STAT. § 790.07(2) (1981).

62. *Garcia*, 444 So. 2d at 970.

Actually the question had been answered in *Bell v. State*,⁶³ where the court held that the double jeopardy clause prohibited multiple convictions and sentences for both the greater and lesser included offenses, and in *State v. Baker*,⁶⁴ which limited *Bell* to necessarily lesser included offenses. Therefore, the answer to the district court's question was in the negative: One can neither be convicted of nor sentenced for a necessarily lesser included offense.⁶⁵

As noted by the court, however, this answer does not resolve the case. Because they have different statutory elements, the firearm offense is not necessarily included in the robbery offense. Both offenses may be separately charged and punished.⁶⁶ While the certified question was therefore irrelevant to the case, it did result in further clarification of this often confusing issue.

E. *State v. Enmund*.⁶⁷ The *Enmund* case had a long journey through the federal and Florida appellate courts before arriving at the Florida Supreme Court for the third time.⁶⁸ The certified question from the Second District Court of Appeal in the instant case was succinctly stated: "When a defendant is convicted of felony murder, can he be convicted of, although not sentenced for, the underlying felony?"⁶⁹

The question was not so succinctly answered, however, as the court determined that the underlying felony (robbery) was not a necessarily lesser included offense, and proceeded to overrule its earlier decision in *State v. Hegstrom*.⁷⁰ In *Hegstrom*, the court stated that the underlying felony was a necessarily included offense within the crime of felony murder, and held that the defendant could be convicted of the underlying felony of robbery, but not sentenced for both the underlying felony

63. 437 So. 2d 1057 (Fla. 1983).

64. 456 So. 2d 419 (Fla. 1984).

65. 476 So. 2d at 170.

66. *Id.*

67. 476 So. 2d 165 (Fla. 1985).

68. *Enmund*, a death penalty case, was initially affirmed by the Florida Supreme Court in *Enmund v. State*, 399 So. 2d 1362 (Fla. 1981). In a leading eighth amendment decision, the United States Supreme Court reversed the death sentence, holding it to be excessive for a participant in a felony murder who does not himself kill, attempt to kill, or intend that the killing occur or that lethal force be employed. *Enmund v. Florida*, 458 U.S. 782 (1982). On remand, the Florida Supreme Court vacated the death penalty and returned the case to the trial court for resentencing. *Enmund v. Florida*, 439 So. 2d 1383 (Fla. 1983). The instant case is thus the third visit of the case to the Florida Supreme Court.

69. 459 So. 2d 1160 (Fla. 2d Dist. Ct. App. 1984).

70. 401 So. 2d 1343 (Fla. 1981).

and the murder. The court based its holding in *Enmund* on its study of *Missouri v. Hunter*,⁷¹ determining that the United States Supreme Court in that case had made it clear that the *Blockburger* rule of statutory construction⁷² will not prevail over legislative intent. The court went on to find sufficient intent on the part of the legislature for multiple punishments when both a murder and a separate felony occur during a single criminal episode.⁷³ Thus the court ruled in answer to the certified question, "that the underlying felony is not a necessarily lesser included offense of felony murder and that a defendant can be convicted of and sentenced for both felony murder and the underlying felony."⁷⁴

F. *State v. Snowden*.⁷⁵ Snowden was tried for both first degree murder and armed robbery. Upon request of defense counsel the jury was instructed that grand theft could be considered as an underlying felony of third-degree murder. Snowden was convicted for third-degree murder and grand theft. The district court of appeal considered whether the defendant may be legally convicted of third-degree (felony) murder and at the same time be convicted of the underlying felony on which the murder conviction is based.⁷⁶ Making a determined effort to analyze the maze of seemingly conflicting decisions extant at that time, the court concluded that the jury had convicted Snowden of grand theft as the underlying felony of third-degree murder and, on the

71. 459 U.S. 359 (1983).

72. *Blockburger v. United States*, 284 U.S. 299 (1932). "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. The *Blockburger* rule has essentially been incorporated into FLA. STAT. § 775.021(4) (1983), which presently reads:

(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offense, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

73. *Enmund*, 476 So. 2d at 167. *Accord* *Vause v. State*, 476 So. 2d 141 (Fla. 1985).

74. *Enmund*, 476 So. 2d at 168.

75. 476 So. 2d 191 (Fla. 1985).

76. 449 So. 2d 332 (Fla. 5th Dist. Ct. App. 1984).

basis of *Bell v. State*,⁷⁷ set aside both the conviction and sentence for grand theft. Unfortunately, the district court of appeal did not have the guidance of the supreme court's decision in *State v. Baker*,⁷⁸ which limited the *Bell* holding to "necessarily lesser included offenses," as the *Baker* decision was still some three months away. Adhering to its current reasoning on the issue, the supreme court concluded that grand theft, as the underlying felony of third-degree murder, is not a lesser included offense, and quashed the decision of the district court.⁷⁹ In a footnote to its decision, the supreme court called attention to Florida Statute section 775.021(4), which incorporates the Blockburger rule; the court said that henceforth, "the Florida Standard Jury Instructions in Criminal Cases (1981), which set forth what had heretofore been lesser included offenses, must be read and modified in light of this legislative decision."⁸⁰

G. *State v. O'Hara*.⁸¹ *O'Hara* involved the question of whether one could be convicted of both extortion and theft for the taking of only one sum of money. The district court of appeal answered the question in the negative.⁸² The supreme court, relying on its decision in *State v. Baker*,⁸³ held that one can be convicted of two crimes for the taking of only one sum of money, provided that neither crime is a necessarily lesser included offense of the other. Since one may commit extortion without thieving and one may commit theft without extorting, neither crime is a necessarily lesser included offense of the other. Thus the court held that the *Baker* test was satisfied, and quashed the decision of the district court of appeal.⁸⁴

III. Defenses to Crimes

A. Entrapment. Perhaps the most significant change in Florida criminal law during 1985 was in the area of the entrapment defense. In January, the supreme court decided *State v. Glosson*,⁸⁵ determining that the contingent fee agreement with the informant in that case vio-

77. 437 So. 2d 1057 (Fla. 1983).

78. 456 So. 2d 419 (Fla. 1984).

79. *Snowden*, 476 So. 2d at 191-92.

80. *Id.* at 192.

81. 478 So. 2d 24 (Fla. 1985).

82. *O'Hara v. State*, 448 So. 2d 424 (Fla. 5th Dist. Ct. App. 1984).

83. 452 So. 2d 927 (Fla. 1984).

84. *O'Hara*, 478 So. 2d at 26.

85. 462 So. 2d 1082 (Fla. 1985).

lated the defendant's due process rights under the state constitution. Within two months, in *Cruz v. State*,⁸⁶ the court made even more significant changes in the entrapment defense by adding an objective test to the subjective test for entrapment. In April, the court decided *State v. Wheeler*⁸⁷ and *Rotenberry v. State*,⁸⁸ which addressed the burden of proof and jury instruction for the entrapment defense.

(1) *State v. Glosson*.⁸⁹ Glosson and five co-defendants were charged with trafficking and conspiring to traffic in cannabis. The charges grew out of a "reverse-sting" operation run by the county sheriff's department. Motions to dismiss based on entrapment and prosecutorial misconduct were filed. The motions were based primarily upon an agreement struck between an informant and the county sheriff whereby the informant would receive a percentage of all civil forfeitures arising out of successful criminal investigations the informant instigated in the county. The agreement with the sheriff was oral, but the state attorney's office knew of the agreement and even supervised the informant's investigations. In order to collect his 10% contingent fee, the informant was required to cooperate in the criminal investigations and testify in court. The fee would be paid out of civil forfeitures resulting from the criminal investigation initiated by the informant. The trial court dismissed the charges, finding a due process violation. The district court of appeal affirmed the dismissal, holding that the constitutional due process issue was an issue of law for the trial court, and that the contingent fee arrangement with the informant violated the defendant's due process right.

In analyzing the issues, the Florida Supreme Court recognized that the due process argument concerning the entrapment defense had not fared well in the federal courts.⁹⁰ Noting with approval decisions from two states that recognize the due process defense to overturn criminal convictions,⁹¹ the court rejected as too narrow the application

86. 465 So. 2d 516 (Fla. 1985).

87. 468 So. 2d 978 (Fla. 1985).

88. 468 So. 2d 971 (Fla. 1985).

89. 441 So. 2d 1117 (Fla. 1st Dist. Ct. App. 1983).

90. The court noted that the United States Supreme Court, in dicta in *United States v. Russell*, 411 U.S. 423 (1973), seemed to recognize the due process entrapment defense; however, it noted that in more recent years only one due process defense has been raised successfully in only one federal circuit court. *Glosson*, 462 So. 2d at 1084.

91. *State v. Hohensee*, 650 S.W.2d 268 (Mo. Ct. App. 1982) and *People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978).

of the due process entrapment defense found in the federal courts. Relying on article 1, section 9 of the Florida Constitution, the court held that governmental misconduct which violates the constitutional due process right of the defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges. Finding in this case that the contingent fee agreement with the informant, who was a vital state witness, violated the defendants' due process rights under the Florida Constitution, the court approved the district court of appeal's decision affirming the dismissal of the charges.⁹²

(2) *Cruz v. State*.⁹³ The decision in *Cruz* resulted from a "drunken bum" police decoy operation undertaken in a high-crime area of Tampa. A police officer, posing as a drunk, pretended to drink wine from a bottle, while leaning against a building near an alleyway, face to the wall. Plainly visible and hanging from his pants pocket was \$150 in currency, paper-clipped together. Cruz and a woman companion happened by about 10:00 P.M. Cruz initially approached the decoy, but then went on his way. Returning ten to fifteen minutes later with his companion, Cruz took the money from the decoy's pocket, whereupon he was arrested. Subsequently charged with grand theft, he moved for a dismissal, arguing that the arrest constituted entrapment as a matter of law. The trial court granted the motion, relying on *State v. Casper*⁹⁴ in finding that the defendant was not predisposed to commit the crime and had been entrapped as a matter of law. The district court of appeal reversed,⁹⁵ holding that predisposition is a question of fact and should not be decided on a motion to dismiss.

In one of its most important decisions of 1985, the supreme court quashed the district court of appeal's decision, finding that the facts surrounding the "drunken bum" police decoy operation constituted entrapment as a matter of law under its therein announced threshold test.

92. *Glosson*, 462 So. 2d at 1085.

93. 465 So. 2d 516 (Fla. 1985).

94. 417 So. 2d 264 (Fla. 1st Dist. Ct. App.), *review denied*, 418 So. 2d 1280 (Fla. 1982). *Casper* involved a "drunken bum" decoy scenario almost identical to that in *Cruz*. The *Casper* decision focused on "predisposition" and held that the state must prove the defendant was predisposed to steal from the decoy. "Predisposition" could be proved in one of four given ways, but under the facts the question boiled down to whether the defendant readily acquiesced to the crime, or "succumbed to temptation." According to *Casper*, this was a matter of law; where the trial judge finds the defendant succumbed to temptation, the matter should not go to the jury, as it is entrapment as a matter of law. *Cruz*, 465 So. 2d at 518-19.

95. *State v. Cruz*, 426 So. 2d 1308 (Fla. 2d Dist. Ct. App. 1983).

While agreeing with the lower court that the question of predisposition will always be a question of fact for the jury, the supreme court found that a second, independent, standard should be established for assessing entrapment. This second standard would examine the official conduct inducing the crime, and would be a question of law, decided by the trial judge. Thus, a two-test approach was established by the *Cruz* decision. The threshold test for the entrapment defense is an objective test, decided by the trial judge. To answer this test, the judge must determine if the police activity: (1) has as its end the interruption of a specific ongoing criminal activity, and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity. If the judge answers both questions in the affirmative, then entrapment as a matter of law has not occurred. The first prong of this threshold test asks if the police activity is seeking to prosecute crime where no such crime exists except for the police activity engendering the crime.⁹⁶ The second prong of the threshold test looks toward the appropriateness of the police activity. In examining the appropriateness of the police activity, the court should consider whether a government agent

induced or encouraged another person to engage in conduct constituting such offense by either (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.⁹⁷

Once the objective test is applied and the trial judge determines that the state has established the validity of the police activity, the subjective test for "predisposition" is to be answered by the jury. This test requires that the jury determine whether the criminal design originated with the government officials and was implanted in the mind of the defendant who was an otherwise innocent person, or whether the defendant was predisposed to commit the crime. Thus a dual test, both objective and subjective, and involving determinations initially by the judge and then by the jury, was adopted by the Florida Supreme Court as the new entrapment defense. In *Cruz*, the court found that the "drunken bum" police decoy activity constituted entrapment as a matter of law under the threshold objective test.

96. *Cruz*, 465 So. 2d at 522.

97. *Id.*

Whether the new Florida standard is consistent with or departs from the "great weight of judicial authority in the United States," was debated in the specially concurring opinion of Justice Overton and the dissenting opinion of Justice Alderman.⁹⁸ Regardless of the answer to this question, a new standard for the entrapment defense has been established in Florida by the *Cruz* decision.⁹⁹

(3) *State v. Wheeler* and *Rotenberry v. State*. In *State v. Wheeler*¹⁰⁰ and *Rotenberry v. State*,¹⁰¹ the supreme court addressed the issue of the burden of proof in the entrapment defense. The problem in *Wheeler* resulted from a colloquy between the defense counsel, assistant state attorney, and trial judge during the closing argument. Among other statements during the exchange, the trial judge stated in front of the jury that in his proposed instruction he was not going to include "any instruction to the effect that the State is required to prove the defendant was not entrapped." The judge's statement was based on the entrapment instruction found in Florida Standard Jury Instruction (Criminal) 3.04(c).¹⁰² That jury instruction does not include a clear

98. *Id.* (quoting from MODEL PENAL CODE § 2.13 (1962)).

99. *Id.* at 523-24. The leading United States Supreme Court cases on entrapment are *Houpton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); and *Sorrelli v. United States*, 287 U.S. 435 (1932). A substantial portion of the majority opinion in *Cruz* was devoted to a discussion of these cases.

100. 468 So. 2d 978 (Fla. 1985).

101. 468 So. 2d 971 (Fla. 1985).

102. The full text of instruction 3.04(c) reads:

3.04(c) Entrapment

The defense of entrapment has been raised. This means that (defendant) claims he had no prior intention to commit the offense and that he committed it only because he was persuaded or caused to commit the offense by law enforcement officers.

(Defendant) was entrapped if:

1. he had no prior intention to commit (crime charged), but
2. he was persuaded, induced or lured into committing the offense and
3. the person who persuaded, induced or lured into committing the offense was a law enforcement officer, or someone acting for the officer.

However, it is not entrapment, merely because a law enforcement officer in a good faith attempt to detect crime:

- a. (provided the defendant the opportunity, means and facilities to commit the offense, which the defendant intended to commit, and would have committed otherwise.)
- b. (used tricks, decoys or subterfuge to expose the defendant's criminal acts.)

statement of the burden of proof. Nevertheless, the supreme court held that in the usual case this instruction is adequate, when given in combination with the general reasonable doubt and burden of proof instruction found in Florida Standard Jury Instruction (Criminal) 2.03. A specific "burden of proof" instruction had not been included within the entrapment instructions when the instructions were rewritten in 1981, in order to avoid undue emphasis as to the state's burden of proof. In *Wheeler*, however, the supreme court found that the statements of the trial judge created an erroneous impression on the jury concerning the burden of proof that was not corrected by a proper instruction. For a general rule concerning the burden of proof in an entrapment defense, the supreme court stated that "[w]hen the defendant has adduced sufficient evidence to make a prima facie case of entrapment, the burden of proof regarding entrapment shifts entirely to the state. After the burden has shifted, no consideration of the defendant's initial burden is permissible."¹⁰³

In *Rotenberry*, the court carried the *Wheeler* decision one step further. In *Wheeler*, the issue did not involve a specific request by the defendant that the court instruct the jury that the state must prove beyond a reasonable doubt that the defendant was not the victim of entrapment. In *Rotenberry*, the certified question from the district court of appeal dealt with such a request.¹⁰⁴ In answering the question, the court held, as it did in *Wheeler*, that instruction 3.04(c) (the standard entrapment instruction), when given in combination with the general reasonable doubt instruction, is adequate. This combination fully informs the jury of the state's burden. The court noted that a "delicate

c. (was present and pretending to aid or assist in the commission of the offense.)

If you find from the evidence that the defendant was entrapped, or if the evidence raises a reasonable doubt about the defendant's guilt, you should find him not guilty.

A margin note advised that factors a, b, and c are to be given as applicable.

103. *Rotenberry*, 468 So. 2d at 981.

104. *Rotenberry v. State*, 429 So. 2d 378, 380 (Fla. 1st Dist. Ct. App. 1983): If the state has the burden to prove beyond a reasonable doubt that a defendant was not entrapped when that defense has been raised, is the giving of the present entrapment instruction as set forth in Standard Jury Instruction 3.04(c) along with the general reasonable doubt instruction sufficient, notwithstanding the defendant having specifically requested the Court to instruct the jury that the state must prove beyond a reasonable doubt that the defendant was not the victim of entrapment by law enforcement officers?

balance has been struck between informing the jury on the law of entrapment and avoiding undue emphasis on the state's burden of proof."¹⁰⁵ The court thus gave its approval of the trial judge's refusal to give any additional, specific instruction on the state's burden of proof in an entrapment defense, even when requested by the defense.

B. Self-defense. A self-defense issue of narrow applicability was addressed by the supreme court in *State v. Holley*.¹⁰⁶ Holley was charged with resisting arrest with violence, among other crimes, stemming from his arrest at an agricultural inspection station for carrying cannabis. At trial, Holley contended that the agricultural inspector had threatened him with a knife during the arrest and that this caused him to resist arrest. He requested a jury instruction that resistance to arrest is justified to the extent necessary for self-defense, as stated in two First District Court of Appeal opinions.¹⁰⁷ The trial court denied the request, and instead gave the then existing standard instruction: "A person is never justified in the use of any force to resist an arrest."¹⁰⁸ Holley was convicted on all charges and appealed, *inter alia*, the denial of the requested jury instruction. The First District Court of Appeal reversed his conviction for resisting arrest with violence on the basis of the denial of the requested instruction in light of *Ivester* and *Allen*, but certified the issue as a question of great public importance.¹⁰⁹

The supreme court, in a 4-2 opinion authored by Justice Overton, approved the First District Court of Appeal's reversal, stating that the law permits a defendant to resist the use of excessive force in making the arrest. The court further noted that the standard jury instruction at issue in the case had been changed as of October 10, 1985, to reflect the correct statement of the law.¹¹⁰ The standard jury instruction now reads:

105. *Rotenberry*, 468 So. 2d at 975.

106. 480 So. 2d 94 (Fla. 1985).

107. *Ivester v. State*, 398 So. 2d 926 (Fla. 1st Dist. Ct. App. 1981), *review denied*, 412 So. 2d 470 (Fla. 1982); *Allen v. State*, 424 So. 2d 101 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 436 So. 2d 97 (Fla. 1983).

108. FLORIDA STANDARD JURY INSTRUCTION (CRIM.) 3.04(d).

109. *Holley v. State*, 464 So. 2d 578, 579 (Fla. 1st Dist. Ct. App. 1984): "Is the Florida Standard Jury Instruction (Criminal) 3.04(d) a correct statement of the law in light of *Ivester v. State*, 398 So. 2d 926 (Fla. 1st Dist. Ct. App. 1981), *review denied*, 412 So. 2d 470 (Fla. 1982), and *Allen v. State*, 424 So. 2d 101 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 436 So. 2d 97 (Fla. 1983)?"

110. See The Florida Bar Re: Standard Jury Instructions (Criminal Cases), 477 So. 2d 985 (Fla. 1985).

A person is not justified in using force to resist an arrest by a law enforcement officer who is known, or reasonably appears to be a law enforcement officer. However, if an officer uses excessive force to make an arrest, then a person is justified in the use of reasonable force to defend himself (or another), but only to the extent he reasonably believes such force is necessary.^{110.1}

The court reversed only the conviction for resisting arrest, leaving the conviction for the other crimes intact, since it found that the erroneous instruction applied only to the resisting arrest charge.¹¹¹

C. Voluntary Intoxication. *Linehan v. State*¹¹² involved the defense of voluntary intoxication to arson and felony murder. Briefly, the facts included a confession by the defendant that he set fire to his girlfriend's apartment, which resulted in one death. Testimony at trial indicated that defendant had been intoxicated at the time he set the fire. Based on this testimony, he requested, but was denied, an instruction on voluntary intoxication as a defense.¹¹³ On appeal, the Second District Court of Appeal affirmed the trial judge's refusal,¹¹⁴ finding that voluntary intoxication is not a defense to arson¹¹⁵ and, further, that voluntary intoxication is not a defense to felony murder if it is not a defense to the underlying felony.

However, the district court certified these two issues to the supreme court as being of great public importance.¹¹⁶ The supreme court affirmed the district court on both issues.

The court disagreed with the defendant's argument that the words

110.1 *Id.* at 1000.

111. Chief Justice Boyd, with whom Justice Shaw concurred, dissented only from this part of the majority opinion. The Chief Justice would have reversed all of the convictions arising from Holley's disarming his would-be captors and fleeing with their weapons. The defendant was entitled, in Justice Boyd's view, to have the jury determine the facts pertaining to all of the charges (resisting arrest, two counts of aggravated assault with a firearm, and two counts of robbery) under legally correct instructions from the court.

112. 476 So. 2d 1262 (Fla. 1985).

113. *Id.* at 1263. He also requested an instruction on second-degree (depraved mind) murder as a lesser included offense of felony murder. This was also refused. The latter refusal resulted in the district court of appeal reversing the conviction, and is briefly discussed under the section above dealing with lesser included offenses.

114. *Linehan v. State*, 442 So. 2d 244 (Fla. 2d Dist. Ct. App. 1983).

115. *Id.* at 253-254.

116. The two issues were framed as the following questions: "1. Whether voluntary intoxication is a defense to arson or to any other crime. 2. Whether voluntary intoxication is a defense to first degree (felony) murder." *Linehan*, 442 So. 2d at 256.

"willfully and unlawfully" as contained in the arson statute¹¹⁷ are words of specific intent. The court noted that the present statutory definition of arson does not materially differ from the common law definition¹¹⁸ with regard to the requisite intent, and that at common law arson was a general intent crime. And while voluntary intoxication has for many years been a defense to specific intent crimes, it does not apply to general intent crimes such as arson. Finding no legislative intention to change the common law intent requirement, the court held that arson under Florida Statute section 806.01 was a general intent crime and, therefore, voluntary intoxication is not a defense to arson.

With regard to whether voluntary intoxication could be a defense to felony murder, the court noted its decision in *Jacobs v. State*,¹¹⁹ where it held that when robbery was the underlying felony of a felony murder, the defendant could defend on the basis that he was too intoxicated to form the intent to commit the underlying felony. However, the court further noted, robbery at common law was a specific intent crime, whereas in the instant case, the underlying felony of arson is a general intent crime. The court concluded that when the underlying felony is based on a specific intent offense, the defense of voluntary intoxication may apply to felony murder, but when the underlying felony is a general intent crime, voluntary intoxication is not a defense.¹²⁰

D. Insanity Defense. In *Patten v. State*,¹²¹ the supreme court had the opportunity to reaffirm its test for insanity at the time of the offense as being the modified M'Naghten test, as contained in Florida Standard Jury Instructions in Criminal Cases.¹²² It also addressed a rather unusual "burden of proof" issue related to the insanity defense.

Patten was charged with first-degree murder and a number of other felonies. At a court-ordered competency hearing, four experts were of the unanimous opinion that the defendant was competent to stand trial, notwithstanding the fact that three years earlier he had been found not guilty of receiving stolen property by reason of insanity. At trial, defendant's counsel had urged the trial court to discard the

117. FLA. STAT. § 806.01 (1981).

118. The supreme court said that at common law, arson was defined as "the willful and malicious burning of a dwelling house, or outhouse within the curtilage of a dwelling of another," *Linehan*, 476 So. 2d at 1265, citing *Duke v. State*, 132 Fla. 865, 870, 185 So. 422, 425 (1938).

119. 396 So. 2d 1113 (Fla.), *cert. denied*, 454 U.S. 933 (1981).

120. *Linehan*, 476 So. 2d at 1265.

121. 467 So. 2d 975 (Fla. 1985).

122. See FLORIDA STANDARD JURY INSTRUCTION (CRIM.) 2.11(b)-1 and 3.04(b).

M'Naghten rule and adopt the American Law Institute Model Penal Code rule, including the "irresistible impulse" test.¹²³ After briefly alluding to the 1977 *Wheeler* decision,¹²⁴ which directed that the present modified M'Naghten test be applied in all Florida criminal trials, the court approved the trial judge's denial of the defendant's motion and went on to address the burden of proof issue.

Patten had argued that because of his prior adjudication of not guilty by reason of insanity, and subsequent civil commitment, the state had the burden of establishing his sanity as an element of the offense, despite his failure to offer any evidence of an insanity defense at trial.¹²⁵ Rejecting this argument, the supreme court noted that insanity is an affirmative defense in Florida, and the burden is upon the defendant to come forth and present some evidence of insanity at trial. It is only upon this showing that the prosecution has the burden of disproving defendant's claim beyond a reasonable doubt. The court went on to state that Patten's argument that his prior adjudication of not guilty by reason of insanity, and subsequent civil commitment, require the state to prove competency, "is correct only when the defense of insanity is asserted and evidence of the adjudication and commitment is introduced at trial."¹²⁶ At the trial no such evidence was introduced; therefore, the prosecution had nothing to rebut.¹²⁷

A somewhat similar holding was made in *Alvoid v. State*,¹²⁸ where the supreme court rejected Alvoid's claims "that his prior adjudication in Michigan of not guilty by reason of insanity, his resulting commitment, and the fact that there has not been a subsequent judicial restoration of sanity result in a continuing presumption of insanity."¹²⁹

Yohn v. State,¹³⁰ another case involving the insanity defense, reminds us of the rather ironic warning by the supreme court that its approval of the standard jury instructions does not insure that the use of such instructions by the trial judge will meet with the supreme

123. *Patten*, 467 So. 2d at 978.

124. *Wheeler v. State*, 344 So. 2d 244 (Fla. 1977).

125. *Patten*, 467 So. 2d at 978.

126. *Id.* at 979.

127. The court noted that the reason for the lack of evidence of insanity was clear from the record: "The appellant had no experts to testify as to his insanity. The State had four witnesses who concluded he was sane and two went further and stated that he was faking mental illness." *Id.* at 975.

128. 459 So. 2d 316 (Fla. 1984).

129. *Id.* at 318.

130. 476 So. 2d 123 (Fla. 1985).

court's approval upon review of a specific case on appeal.¹³¹ Yohn had been charged with the first degree murder, by shooting, of a woman who had been having an affair with Yohn's husband.¹³² The defense presented expert testimony by a psychiatrist and a psychologist that Yohn was insane at the time of the shooting; thereafter, the defense requested special jury instructions stating that the state had the burden of proving beyond a reasonable doubt that defendant was sane at the time of the incident.¹³³ This special instruction was refused; however, the relevant standard jury instructions, including the instructions on insanity¹³⁴ and the state's burden to prove guilt beyond a reasonable doubt,¹³⁵ were given by the court.¹³⁶ The First District Court of Appeal concluded that even though the requested instructions correctly stated the Florida law, the given instructions were adequate considering the instructions as a whole.¹³⁷ In reversing, the Florida Supreme Court ruled that the instructions given did not adequately and correctly charge the jury as to the Florida law on the issue. The problem found by the court with the standard jury instruction on insanity was that the instruction frames the issue as one of finding the defendant legally insane, thus placing the burden on the defendant. The jury is never instructed in the standard charge that the state must prove anything with regard to sanity. The court noted that the standard jury instruction on reasonable doubt and burden of proof¹³⁸ did not remedy the problem as this instruction was general and the insanity instructions were specific. While the general instruction referred to the state's burden of proving every element, nowhere in the instructions was it stated that sanity was an element, which, according to the court, it clearly is.¹³⁹ Since the defendant's requested special instructions¹⁴⁰ correctly and accurately

131. See *In the Matter of the Use by Trial Courts of Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594, *modified*, 431 So. 2d 599 (Fla. 1981): "[T]he court recognizes that no approval of these instructions by the court could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him."

132. *Yohn v. State*, 450 So. 2d 898 (Fla. 1st Dist. Ct. App. 1984).

133. *Id.* at 899-900.

134. FLORIDA STANDARD JURY INSTRUCTIONS (CRIM.) 3.04(b).

135. FLORIDA STANDARD JURY INSTRUCTIONS (CRIM.) 2.03.

136. *Yohn*, 450 So. 2d at 900.

137. *Id.* at 901.

138. FLORIDA STANDARD JURY INSTRUCTIONS (CRIM.) 2.03.

139. Citing *Parkin v. State*, 238 So. 2d 817 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971).

140. The requested instructions are set forth in both *Yohn v. State*, 476 So. 2d

set forth the law, and the standard jury instructions given did not, the supreme court quashed the decision of the district court of appeal and ordered the case remanded for a new trial.

It should be noted that the supreme court split four to three in the decision. The dissenters relied on *Rotenberry v. State*,¹⁴¹ which is discussed above and which dealt with the defense of entrapment. In *Rotenberry*, the defendant had requested that the jury be instructed that the state must prove that the defendant was not entrapped beyond a reasonable doubt. The trial court refused and instead merely gave the standard jury instruction on entrapment and burden of proof. *Rotenberry* was affirmed by the district court of appeal¹⁴² but the issue of the sufficiency of instructions was certified to the supreme court, where it was approved as striking a delicate balance between "informing the jury on the law of entrapment and avoiding undue emphasis on the state's burden of proof."¹⁴³

E. Double Jeopardy. Double jeopardy is an issue mixed inextricably with the issues of lesser included and multiple offenses, discussed in Part II, above. Consequently, many cases, such as *Houser v. State*,¹⁴⁴ which follows, could be placed under the heading of "double jeopardy" or "lesser included and multiple offenses." In *Houser v. State*, the court addressed the certified question of "whether a defendant may be properly convicted of and sentenced for both DWI manslaughter and vehicular homicide for effecting a single death" without constituting double jeopardy.¹⁴⁵ In answering that question in the negative, the court clarified the extent to which a defendant may be prosecuted for a death caused by his driving while intoxicated.

Houser had a blood alcohol level of 0.18% when the car he was driving struck a concrete wall, killing a passenger. He was charged with DWI manslaughter¹⁴⁶ and vehicular homicide,¹⁴⁷ and convicted and sentenced on both charges. The First District Court of Appeal affirmed the convictions and sentences,¹⁴⁸ but certified the above question as being of great public importance. The district court of appeal also

123 (Fla. 1985), and *Yohn v. State*, 450 So. 2d 898 (Fla. 1st Dist. Ct. App. 1984).

141. 468 So. 2d 971 (Fla. 1985).

142. 429 So. 2d 378 (Fla. 1st Dist. Ct. App. 1983).

143. *Rotenberry*, 468 So. 2d at 975.

144. 474 So. 2d 1193 (Fla. 1985).

145. *Houser*, 474 So. 2d at 1195.

146. In violation of FLA. STAT. § 316.1931(2) (1983).

147. In violation of FLA. STAT. § 782.071 (1983).

148. *Houser v. State*, 456 So. 2d 1265 (Fla. 1st Dist. Ct. App. 1984).

recognized that its decision was directly in conflict with the Fifth District Court of Appeal's decision in *Vela v. State*.¹⁴⁹

The supreme court rejected the lower court's two-fold rationale that, first, convictions under both statutes did not violate double jeopardy since each crime was separate from the other in that each "requires proof of an element which the other does not"; and second, that DWI manslaughter is merely an enhancement of the penalty for driving while intoxicated.¹⁵⁰ The supreme court stated that although under the *Blockburger* test¹⁵¹ and its statutory equivalent¹⁵² the crimes are separate, these tests "are only tools of statutory interpretation which cannot contravene the contrary interest of the legislature."¹⁵³ The "assumption underlying the *Blockburger* rule is that the legislature ordinarily does not intend to punish the same offense under two different statutes."¹⁵⁴ The court noted that Florida courts have determined in many cases, including cases directly on point with *Houser*,¹⁵⁵ that the legislature did not intend to punish a single homicide under two different statutes.

In rejecting the district court of appeal's rationale that DWI manslaughter is simply an enhanced penalty for driving while intoxicated, the court simply stated that the death of a victim "raised DWI manslaughter beyond mere enhancement and places it squarely within the scope of this state's regulation of homicide."¹⁵⁶

In October, 1985, the court in *State v. Gordon*¹⁵⁷ reiterated its decision in *Houser* by approving the Fifth District Court of Appeal's decision vacating the DWI manslaughter conviction of the appellant, who had also been convicted of second degree murder for the same death. The supreme court simply relied on the rationale expressed in *Houser* in upholding the district court of appeal's decision.

Gordon and *Houser* made clear that, absent an unambiguous specified legislative statement authorizing prosecution of a defendant for

149. 450 So. 2d 305 (Fla. 5th Dist. Ct. App. 1984).

150. *Houser*, 474 So. 2d at 1196. See also FLA. STAT. § 775.021(4) (1983).

151. *Blockburger v. United States*, 284 U.S. 299 (1932).

152. FLA. STAT. § 775.021(4) (1983).

153. *Houser*, 474 So. 2d at 1196.

154. *Id.* at 1196, quoting *Ball v. United States*, 105 S. Ct. 1668, 1672 (1985).

155. *Houser*, 474 So. 2d at 1197, citing *Ubellis v. State*, 384 So. 2d 1294 (Fla. 2d Dist. Ct. App. 1980), and *Brown v. State*, 371 So. 2d 161 (Fla. 2d Dist. Ct. App. 1979), *aff'd*, 386 So. 2d 549 (Fla. 1980).

156. *Houser*, 474 So. 2d at 1196.

157. 478 So. 2d 1063 (Fla. 1985).

DWI manslaughter plus another homicide for a single death, such charges are not permitted, *Blockburger* and Florida Statute section 775.021(4) notwithstanding.

F. Collateral Estoppel. In *Green v. State*,¹⁵⁸ the court was faced with a certified question from the Third District Court of Appeal concerning the defense of collateral estoppel. Green, who was on probation for robbery, was charged with several crimes. Prior to trial on those charges, a probation revocation hearing was held. The trial judge at that hearing determined that the evidence against Green was insufficient to revoke his probation since the state had not proved the elements of the charged offenses beyond a reasonable doubt. At his subsequent trial on the charges, Green moved to dismiss, arguing that the state was collaterally estopped from prosecuting him because of the result of the probation revocation hearing. The motion was denied and Green was convicted; the district court of appeal upheld the conviction,¹⁵⁹ but certified the collateral estoppel question to the supreme court as one of great public importance.¹⁶⁰

The supreme court, in a five to two decision, affirmed the district court of appeal, thus upholding Green's conviction. Rather than addressing the case in collateral estoppel terms, the court broadened its discussion to the issue of double jeopardy. The court reasoned that since the probation revocation hearing was only to determine if Green's probation for a prior offense had been violated, it was a deferred sentencing proceeding, citing as authority two earlier opinions by the court.¹⁶¹ The court went on to say that Green had not been subjected to conviction or punishment for his new criminal activities during the probation revocation hearing, so there was no double jeopardy bar to his subsequent prosecution for those activities. As an analogy, the court noted that a defendant properly may be prosecuted even though there is a finding of no probable cause at a preliminary hearing.¹⁶²

Justice McDonald dissented in an opinion in which Justice Adkins

158. 463 So. 2d 1139 (Fla. 1985).

159. *Green v. State*, 450 So. 2d 509 (Fla. 3d Dist. Ct. App. 1984).

160. *Id.* at 509: "When in a probation revocation proceeding, a trial judge finds that the evidence is insufficient to prove the criminal offense asserted as the ground for revocation, is the state collaterally estopped from trying the defendant for the same criminal offense?"

161. *Green*, 463 So. 2d at 1140, citing *State v. Payne*, 404 So. 2d 1055 (Fla. 1981), and *Delaney v. State*, 190 So. 2d 578 (Fla. 1966).

162. *Green*, 463 So. 2d at 1140, citing *State v. Hernandez*, 217 So. 2d 109 (Fla. 1968).

concurred. Stating that collateral estoppel and double jeopardy are "distinct legal concepts," Justice McDonald argued that the former concept could be disposed of merely by finding that jeopardy did not attach during the probation revocation hearing. He cited the United States Supreme Court's definition and rule regarding collateral estoppel: "When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future law suit."¹⁶³ Since the issue litigated in the criminal trial was exactly the same as that litigated in the earlier probation revocation hearing, during which the trial judge sitting as trier of fact found Green not guilty, the dissent argued that collateral estoppel should have prevented the subsequent trial.¹⁶⁴

It appears that the dissent had a better grasp of the law and the distinction between double jeopardy and collateral estoppel. However, had the court adopted the position of the defense, the practical application of the rule would have created an extremely burdensome and risky situation for the state when attempting to revoke a defendant's probation prior to trying him for his latest criminal conduct.

IV. Conclusion

The Florida Supreme Court devoted much of its work during 1985 toward clarifying the law regarding lesser included and multiple offenses. It is apparent from a close reading of the court's opinions, however, that the law in this complicated area is still far from being clear and will continue to occupy much of the court's time in future years. Even while concurring, Justice Shaw, in two important decisions,¹⁶⁵ has expressed serious concern regarding the underlying and fundamental reasoning of the court in this area.

Most of the decisions during 1985 regarding substantive criminal offenses and defenses were of a limited or narrow reach. However, in the important area of entrapment the court took a giant step and spoke with unusual clarity. In adding the threshold objective test, to be applied by the judge, to the "predisposition test" applied by the jury, the court departed from the federal (and majority) rule, and adopted a dis-

163. *Ashe v. Swenson*, 397 U.S. 436 (1970).

164. *Green*, 463 So. 2d at 1140 (McDonald, J., dissenting).

165. *State v. Enmund*, 476 So. 2d 165 (Fla. 1985), and *Green v. State*, 475 So. 2d 235 (Fla. 1985).

tinctive minority position. This appears to be one area where the law should be stabilized for the foreseeable future.